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Supreme Court, U.S.
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NO. 91-

IN THE

Supreme Court of the United States

October Term, 1991

DENNIS EDWARD RYAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTIONS PRESENTED

1. Whether Colorado's criminal libel statute violates the First and Fourteenth Amendments in that, in a prosecution for libel of a private person, it:

   a. requires no showing of any fault on the defendant's part with respect to the falsity of the libel; and

   b. fails to assign to the prosecution the burden of showing the falsity of the libel.

2. Whether Colorado's criminal libel statute, which permits criminal liability to be imposed for, among other things, truthful statements that "tend to expose the natural defects of one who is alive" is unconstitutionally vague and overbroad.

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PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as *People* v. *Ryan* at 806 P.2d 935 (Colo. 1991), and is included in the Appendix at App. 1a-17a. The opinion of the trial court is unreported, and is also included in the Appendix at App. 18a-22a.

JURISDICTION

The judgment of the Colorado Supreme Court (App., *infra*, 23a) was entered on March 27, 1991. By order dated May 17, 1991, Justice Byron R. White extended the time within which to

file a petition for a writ of certiorari to and including July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Amendment 14 to the United States Constitution states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18-13-105 of the Colorado Revised Statutes states as follows:

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.

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[1]The judgment of the court below is a sufficiently "final judgment or decree," 28 U.S.C. § 1257(a), for review by this Court. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975). As in that case, the Colorado Supreme Court's "judgment is plainly final on the federal issue," and the petitioner faces the prospect of criminal liability, if the State makes its case. *Id.* at 485. If petitioner prevailed on a nonfederal ground, "there would remain in effect the unreviewed decision of the State Supreme Court . . . 'leav[ing] unanswered . . . an important question . . . under the First Amendment.' " *Id.* at 485-86 (citing *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)). Finally, reversal by this Court on the federal issue "would be preclusive of any further litigation on the relevant cause of action . . . ." *Id.* at 483.

(2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.

(3) Criminal libel is a class 6 felony.[2]

STATEMENT OF THE CASE

Petitioner was charged with violating Colorado's criminal libel statute for publicizing, via a fictitious "Wanted" poster, his quarrel with a former girlfriend. The criminal information filed against petitioner charged him with violating two provisions of Colo. Rev. Stat. § 18-13-105 (1986 and supp. 1990): the "impeach[ing] the honesty, integrity, virtue and reputation" clause and the "expos[ing] the natural defects of one who is alive" clause (App., *infra,* 24a). The poster included a picture of the woman, made unflattering references to her conduct and person, and offered a reward for information leading to her civil or criminal prosecution.

Petitioner moved to dismiss the charge. He argued that the criminal libel statute is unconstitutionally overbroad because it fails to require "actual malice" with respect to the falsity of the libel. He also contended that the statute unconstitutionally places the burden of proving the truth of the libel on the defendant, and that it is unconstitutionally vague. The trial court granted the motion on petitioner's first ground (App., *infra,* 20a).

The State prosecuted a mandatory appeal to the Colorado Supreme Court.[3] That court reversed. Although it "recognize[d]

[2]Subsection (3) was amended, effective July 1, 1989, changing criminal libel from a class 5 to a class 6 felony. Ch. 148, sec. 102, § 18-13-105, 1989 Colo. Sess. Laws 820, 842-843. Class 6 felonies are punishable by one to two years imprisonment, and a fine of up to $100,000. *Id.*, sec. 40, § 18-1-105, 1989 Colo. Sess. Laws at 829.

[3]In the Colorado Supreme Court, the State of Colorado argued that (i) the *Times/Garrison* "actual malice" requirement had no application to petitioner's case, (ii) he lacked standing to challenge the statute on overbreadth grounds, and (iii) the court could narrow the statute. Opening Brief of Plaintiff-Appellant.

(Footnote continued on following page)

that Section 18-13-105's lack of an 'actual malice' standard threatens to deter a substantial amount of expression protected by the first amendment," it found that partial invalidation would allow it to "save the statute" (App., *infra,* 10a).[4] The court held the libel statute "invalid only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern" (App., *infra,* 10a-11a). It found the statute, as narrowed, constitutionally valid for prosecutions for libel of a private person, and remanded the case with instructions to reinstate the charge (App., *infra,* 11a).

Justice Quinn dissented. He thought that, even as narrowed by the majority, the criminal libel statute remained unconstitutionally vague and overbroad (App., *infra,* 14a). He specifically noted its lack of a requirement of any fault with respect to the falsity of the libel, observing that a person might be "subject to criminal prosecution for the knowing publication or dissemination of a defamatory statement even though the statement was true and the person making the statement knows it to be true" (App., *infra,* 14a). He further concluded that the assignment of the burden of proving the truth of the libel to the criminal defendant, and the limitations on the availability of truth as a defense in the libel statute, produced the unacceptable result "that a person publishing a true statement that exposes the natural defects of a living person would nonetheless be subject to criminal prosecution . . . ." (App., *infra*, 15a). Finally, he thought the criminal libel statute, "even with the majority's construction," was unconstitutionally vague (App., *infra*, 16a).

This timely petition for a writ of certiorari followed.

(Footnote continued from previous page)

Petitioner responded that (i) under the overbreadth doctrine, a party has standing to challenge the statute, even if the statute may be constitutionally applied to the party before the court, and (ii) the Colorado Supreme Court could not rewrite the statute. Answer Brief of Defendant-Appellee.

[4]The court thought that petitioner had conceded the constitutionality of the statute's application to his conduct. He did not. *See infra* n.15.

REASONS FOR GRANTING THE PETITION

I. Colorado's Criminal Libel Statute Lacks the First Amendment Safeguards This Court Requires in Libel Cases

The district attorney below elected to prosecute petitioner under Colorado's century-old[5] criminal libel statute.[6] The Colorado Supreme Court held that petitioner could constitutionally be prosecuted under the statute, as narrowed by that court.

The case is important and worthy of this Court's review because the Colorado Supreme Court's decision, if allowed to stand, means that none of the First Amendment safeguards that this Court requires in civil libel actions will have any application in a criminal libel prosecution, if it involves libel of a private person. Such a conclusion would be inconsistent with almost thirty years of decisions involving libel and the First Amendment in this Court, and would leave the State's old criminal libel statute available for the prosecution of persons making true and innocently false statements, if the authorities decided the statements were within the statute's vague ambit.

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[5]Colo. Rev. Stat. § 18-13-105 existed substantially in its present form in 1868, eight years before Colorado entered the Union. Revised Statutes of Colorado Territory § 121 (1868).

[6]Colorado has a statute forbidding "harassment" by "repeated . . . insults, taunts, or challenges [of] another in a manner likely to provoke a violent or disorderly response." Colo. Rev. Stat. § 18-9-111(1)(h) (1986 and supp. 1990). It also has a "disorderly conduct" statute forbidding "intentionally, knowingly, or recklessly . . . mak[ing] a coarse and obviously offensive utterance, gesture, or display in a public place [that] tends to incite an immediate breach of the peace . . . ." Colo. Rev. Stat. § 18-9-106(1)(a) (1986 and supp. 1990)

The affidavit submitted to obtain a warrant to arrest petitioner recited probable cause to believe petitioner violated the "harassment" statute, as well as the criminal libel statute; but in the information filed against petitioner, the authorities elected to proceed only under the criminal libel statute (App., *infra,* 24a).

Having elected here to proceed against petitioner on the basis of a libel statute that criminalizes pure speech,[7] the prosecution should be required to play by the rules that this Court has laid down for libel law. It should be required to prove that petitioner's statements were false, and that the petitioner was guilty of some fault regarding their falsity. Colorado's criminal libel statute does not contain either of these requirements.

A. The Colorado criminal libel statute contravenes the First and Fourteenth Amendments because it does not require any showing of fault on the defendant's part with respect to the falsity of the libel

The court below upheld the statute, notwithstanding that it found that the statute required no showing of any fault on the defendant's part with respect to the falsity of the libel.

The court below clearly ruled the criminal libel statute's "knowingly" requirement applies only to the publication or dissemination element of the offense (App., *infra*, 8a). Justice Quinn, in dissent, noted that the majority's opinion did not construe the "knowingly" requirement to apply "to the falsity of the statement" (App., *infra*, 14a); and the majority opinion nowhere contradicts this assertion.[8] As a result, the statute contains no requirement of any state of mind or fault with respect to the falsity of a libel. Liability on that count is strict.[9]

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[7]As contrasted with Colorado's harassment and disorderly conduct statutes, which both require that the punished speech tend to produce a breach of the peace, *see supra* n.6.

[8]The trial court also specifically ruled that the "knowingly" requirement applied only to the publication or dissemination elements, and not to the falsity of the libel (App., *infra*, 19a).

[9]Colo. Rev. Stat. § 18-1-502 (1986 and supp. 1990), dealing with "requirements for criminal liability" states, "if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of 'strict liability.' "

The question whether, in a purely private libel action, a state may make falsity a matter of strict liability has never been squarely addressed by this Court. Nevertheless, in a range of libel cases spanning almost thirty years, this Court has repeatedly said that the "breathing space" which First Amendment freedoms "need to survive" requires a showing of fault on the defendant's part.

1. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), said that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive' " *Id.* at 271-272 (quoting *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433 (1963)). The Court found that Alabama's libel law was "not saved by its allowance of the defense of truth. . . . Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." *Id.* at 278, 279 (footnote omitted). The Court said that the need to protect speech meant there must be some margin for error in the form of a requirement that the defendant has been guilty of fault with respect to a libel's falsity. It held that the First and Fourteenth Amendments "require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280.

2. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), applied the *Times* rule to a prosecution for criminal libel brought against a district attorney who disparaged the judicial conduct of eight judges before whom he appeared. The Court held that, notwithstanding "the differing history and purposes of criminal libel, the New York Times rule" applied and required reversal. *Id.* at 67. The Court saw "no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel law, and therefore should not be subject to the same limitations." *Id.* at 67 (footnote omitted).

3. *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967), extended the *Times* fault requirement to libels of public figures, "individuals . . . who . . . are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C. J. concurring).

4. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), extended the fault requirement to libel actions brought by private figures. The Court held that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. *Gertz* also stated that the "States may not permit recovery of presumed or punitive damages," absent *New York Times* malice. *Id.* at 349.

5. *Dun & Bradstreet Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), declined to apply the *Gertz* rule requiring *Times* malice for presumed or punitive damages to a purely private libel, *i.e.*, a civil suit for libel between private parties, where the defamatory statements involve "no issue of public concern." *Id.* at 761. It did indicate however, that some degree of constitutional protection would be required:

> [S]peech on matters of purely private concern . . . . is not totally unprotected by the First Amendment.

Id. at 759-60 (citing *Connick* v. *Myers*, 461 U.S. 138, 147 (1983)). The Court expressed no view regarding what standard of liability should be applied with regard to the statement's falsity, although the facts of the case were strongly suggestive of at least negligence ("a 17-year-old high school student paid [by defendant] to review Vermont bankruptcy pleadings . . . inadvertently attributed [to plaintiff] a bankruptcy petition filed by one of [plaintiff's] former employees," 472 U.S. at 752).

6. *Milkovich* v. *Lorain Journal Co.*, U.S. , 110 S.Ct. 2695 (1990), decided last term, affirmed the continuing vitality of the "*New York Times—Butts* and *Gertz* culpability requirements . . . ." *Id.* at 2706.

Thus, this Court has never embraced the proposition that a state may impose liability for a statement which is false, but innocently so; and it has, in many cases, indicated it would not do so. If the Court will not permit strict liability with regard to falsity in a civil case for a private libel, surely there is even less reason to do so in a criminal libel prosecution. Given the declining social justification for criminal libel laws,[10] and the substantially more serious consequences of criminal liability,[11] the Court should grant certiorari in this case and make clear that a state may not criminalize libelous speech, absent a showing that the defendant was guilty of some fault with regard to the statement's falsity.

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[10]*Garrison* noted that the traditional justification for criminal libel—"to avert the possibility that the utterance would provoke an enraged victim to a breach of the peace"—had little or no basis "under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures . . . ." 379 U.S. at 68, 69. The court below noted this historic justification for criminal libel (App., *infra*, 6a), but made no claim that the Colorado criminal libel statute could be justified by such purposes. Indeed, the statute could not survive muster as a breach of the peace or "fighting words" law; *cf.* Colo. Rev. Stat. §§ 18-9-111(1)(h) and 18-9-106(1)(a), *supra* n.6.

[11]*In re Winship*, 397 U.S. 358, 363-64 (1970) (reasonable-doubt standard constitutionally required in criminal cases because "accused during a criminal case has at stake [an] interest of immense importance, both because of the possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction"); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982) (in considering vagueness challenges, Court will be more tolerant of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe).

B. The Colorado criminal libel statute contravenes the First and Fourteenth Amendments because it does not assign to the prosecution the burden of showing the falsity of the libel

The court below also failed to rule affirmatively on petitioner's related claim that the criminal libel statute's provision making truth an "affirmative defense . . . render[s] it unconstitutional."[12] Memorandum Brief in Support of Defendant's Motion to Dismiss at 8. This Court's opinion in *Philadelphia Newspapers, Inc.* v. *Hepps,* 475 U.S. 767 (1986), and its other First Amendment opinions, make clear that the "breathing space" needed for the viability of First Amendment freedoms also requires that a state bear the burden of proof on the issue of the statement's falsity.

In *Hepps,* an action for libel of a private person against a media defendant, the Court invalidated Pennsylvania's rule that made truth an affirmative defense:

> [W]e believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before receiving damages for defamation from a media defendant. To do otherwise would "only result in a deterrence of speech which the Constitution makes free."

Id. at 777 (citing *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958)).

The Court in *Hepps* explained that its decision flowed from the more general principle that when the government seeks to restrict speech, it bears the burden of showing that the restriction is appropriate:

> In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.

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[12]The criminal information filed against petitioner nowhere alleges that any of the statements attributed to him were false (App., *infra,* 24a).

475 U.S. at 777 (citing cases).[13] Petitioner's speech here is entitled to First Amendment protection. *See Greenmoss,* 472 U.S. at 759, 760 (speech on matters of purely private concern entitled to First Amendment protection, albeit less than speech on matters of public concern). Accordingly, under the general standard set forth in *Hepps,* the state must bear the burden of proof on the issue of falsity in a criminal libel case.

The holding in *Hepps* is consistent with the Court's earlier opinions in libel cases. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), noted that:

> The state rule of law is not saved by its allowance of the defense of truth. . . . Allowance of the defense of truth, *with the burden of proving it on the defendant,* does not mean that only false speech will be deterred.

Id. at 278, 279 (emphasis added). In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), the Court noted:

> We held in New York Times that a public official might be allowed the civil remedy *only if he establishes that the utterance was false* and that it was made with [malice]. The reasons which led us to so hold . . . apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy.

Id. at 74 (emphasis added).[14]

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[13]The Court cites *Consolidated Edison Co.* v. *Public Service Comm'n of N.Y.,* 447 U.S. 530, 540 (1980) (content-based restriction), *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978) (speaker-based restriction), *Renton* v. *Playtime Theatres, Inc.,* 475 U.S. 41, 47-54 (1986) (secondary-effects restriction), and *Speiser* v. *Randall,* 357 U.S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits) as manifestations of this general principle.

[14]The Court's "purely private libel" case, *Dun & Bradstreet Inc.* v. *Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), does not discuss the burden of proving falsity, but it does appear that Vermont libel law assigned the burden of proving falsity to the plaintiff. *Id.* at 752 ("action . . . alleged that the false report had injured its reputation . . . .")

Here again, criminal liability is much more serious. It involves the stigmatization and punishment of the accused by the state with its manifold resources. *In Re Winship* recognized that the criminal defendant's stake was "an interest of transcendent value," 397 U.S. at 364, and held that "the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id. See also Francis* v. *Franklin,* 471 U.S. 307 (1985) (state may not shift burden of proof to defendant on element of criminal offense).

The *Hepps* analysis is correct, and applies to this case: if the State wishes to impose criminal liability on one who has made an allegedly false statement, it must bear the burden of showing the statement's falsity.

The significance of this issue for the states' criminal libel laws is a further reason for the issuance of a writ of certiorari.

II. Colorado's Criminal Libel Statute Is Unconstitutionally Vague and Overbroad

Colorado's criminal libel statute remains overbroad, even after its narrowing by the court below. The Court has made clear that an overbroad statute, *i.e.* one which "reaches a substantial amount of constitutionally protected conduct," cannot stand. *Houston* v. *Hill,* 482 U.S. 451, 458-59 (1987); *see also Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

Petitioner consistently maintained below that the criminal libel statute was overbroad.[15] The Colorado Supreme Court agreed,

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[15]The court below stated that "defendant concedes . . . that § 18-13-105 is constitutional as it applies to his conduct" (App., *infra*, 4a).

It is not clear what the court means by this statement or what the basis for it is. Nothing in the record below reflects such a concession. Counsel who argued the case below recalls such a concession being posited in oral argument only *arguendo*, as a predicate to petitioner's overbreadth claim.

(footnote continued on next page)

and invalidated the statute only "insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern" (App, *infra,* 10a-11a). But if a state court adopts a narrowing construction, that construction must comport with the scope of First Amendment protection deemed necessary by this Court; if it does not do so, or if the resulting enactment is vague, this Court will proceed to invalidate the statute. *Ashton* v. *Kentucky,* 384 U.S. 195 (1966); *see also Gooding* v. *Wilson,* 405 U.S. 518 (1972).

The "precise category of protected conduct" discerned by the court below—statements about public officials or public figures on matters of public concern (App., *infra,* 10a)—falls considerably short of what this Court has held to be protected. Most tellingly, in cases of libel of a private figure where the libel relates to a matter of public concern, the court below neither required fault with respect to falsity nor assigned the burden of proof on

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If the court's statement reflects its belief that petitioner's statements in the poster were false, it is appropriate to note that the information filed against petitioner charges him with "expos[ing] the natural defects of one who is alive" and does not even allege that any of the statements were false (App., *infra,* 24a). Moreover, petitioner's counsel in the Supreme Court of Colorado specifically stated that petitioner did not admit that the poster's allegations were false. Answer Brief of Defendant-Appellee at 2.

Finally, if the statements were admitted to be false, this would provide petitioner an expanded overbreadth challenge, see *infra* pp. 14-15. That is, if petitioner's statements were false and he could not challenge the statute as applied to him on this ground, he may then challenge the statute's overbreadth for its failure to provide that truth is a defense. *See Brockett* v. *Spokane Arcades, Inc.,* 472 U.S. 491, 503 (1985). The statute is capable of being applied to any number of true statements which "expose the natural defects of one who is alive," and, under overbreadth doctrine, the Court will consider all applications to which the statute might reasonably be put. *City of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 800-801 (1984).

the issue of falsity to the prosecution. Yet this Court's decisions clearly require proof of fault[16] and assign to the prosecution the burden of proving falsity[17] in such cases. The statute thus threatens much protected expression, and plainly is substantially overbroad.[18]

Moreover, the statute's real overbreadth extends much farther. Even if it incorporated the First Amendment safeguards of fault and burden of proof on falsity that the Court requires in libel actions, its archaic phrasing and its limitations on truth as a defense render it at once impermissibly vague[19] and hopelessly

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[16]*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1975); see discussion *supra* p. 8.

[17]*Philidalphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986); see discussion *supra* p. 10.

[18]The court's construction would also permit prosecutions for libels of a public figure on matters of "private concern." This likewise is of questionable constitutionality. *Cf. Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971) ("charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to a candidate's fitness for office" for purposes of applying *Times* rule).

[19]Vagueness and overbreadth cannot be entirely separated. *Kolender* v. *Lawson*, 461 U.S. 352, 358 n.8 (1983).

The "expose the natural defects of one who is alive" clause of Colorado's criminal libel statute is unquestionably vague. No reported case in Colorado has ever construed the clause. Nor, so far as counsel can discover, has any other court. A search of *Black's Law Dictionary, American Jurisprudence 2d, Corpus Juris Secundum,* and a Westlaw search have disclosed no case construing the phrase or indicating what the offense of "exposing a natural defect" might include. There is, accordingly, "no settled usage or tradition of interpretation in law" for these terms. *Gentile* v. *State Bar of Nevada,* 59 U.S.L.W. 4858, 4563 (US. June 27, 1991). Additionally, the terms "natural" and "defect" are strikingly imprecise, and so resemble the "classical terms of degree" recently invalidated in *Gentile. Id.*

Moreover, the statute is clearly susceptible to arbitrary enforcement. This Court has exhibited far less tolerance for vague enactments with criminal as opposed to civil penalties, because the consequences of imprecision, and the resulting risks of arbitrary and discriminatory en-

(footnote continued on following page)

overbroad. Indeed, its vagueness feeds its overbreadth: the lack of any clearly demarcated core of forbidden conduct means there may be a practically limitless number of situations for which truth is unavailable as a defense. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (vagueness affects overbreadth in that "court should evaluate the ambiguous as well as the unambiguous scope of the enactment").

The vagueness and overbreadth of Colorado's criminal libel statute represent an additional reason why the Court should issue a writ of certiorari to review the judgment of the Colorado Supreme Court.

(footnote continued from previous page)

forcement, are much more serious where liberty is at stake. *Village of Hoffman Estates,* 455 U.S. at 498-499. Just days ago, the Court reiterated that the proper inquiry regarding vagueness is not whether discriminatory enforcement occurred in the case before the Court, but whether the statute is so imprecise that discriminatory enforcement is a real possibility. *Gentile,* 59 U.S.L.W. at 4864. Here, the possibility that a powerful individual who dislikes what has been written about him (but wishes to avoid the risks and rigors of a civil libel suit) might obtain enforcement of the criminal libel law manifestly poses the risk of arbitrary and discriminatory enforcement.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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Dated: July 10, 1991

APPENDIX A

SUPREME COURT, STATE OF COLORADO

NO. 89SA497

March 11, 1991

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

DENNIS EDWARD RYAN,
Defendant-Appellee.

Appeal from the District Court, Larimer County
Honorable William F. Dressel, Judge

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH INSTRUCTIONS

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JUSTICE VOLLACK delivered the Opinion of the Court.
JUSTICE QUINN dissents.
CHIEF JUSTICE ROVIRA does not participate.

The People appeal the trial court's dismissal of the information filed against the defendant, Dennis Ryan, and its ruling that Colorado's criminal libel statute, § 18-13-105, 8B C.R.S. (1986), is facially unconstitutional. We reverse and remand with instructions.

I.

On April 13, 1989, the defendant was charged with criminal libel in violation of section 18-13-105, 8B C.R.S. (1986). That section provides:

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.
>
> (2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.
>
> (3) Criminal libel is a class 5 felony.[1]

The defendant was charged with criminal libel for mailing copies of a fictitious "Wanted" poster to several businesses, bars, and a local trailer park in Fort Collins, Colorado. The poster, which pictured and named the libel victim, stated that the victim was wanted for "fraud, conspiricy [sic] to commit fraud, various flim-flam schemes, spouse abuse, child abuse-neglect, sex abuse, abuse of the elderly, prostitution, assault, larceny, theft of services, wage chiseling, [and] breach of contract." The poster further stated that the victim "frequents local bars in company of men with longest hair and/or best contraband," was "86'd from bars

[1]Effective July 1, 1989, subsection (3) was amended, changing criminal libel to a class 6 felony. Ch. 148, sec. 102, § 18-13-105, 1989 Colo. Sess. Laws 820, 843.

in two states for soliciting multiple male customers," "often masquerades as 'peace worker', day care worker, cook, waitress, dancer," "has harbored various forms of VD," and is at "high risk for AIDS." In addition, the poster set forth the victim's age, hair color, weight, height, eye color, birth date, and residence, and offered a $3,000 reward for "information leading to the criminal or civil prosecution" of the victim. Finally, the poster requested that inquiries and information be sent to a post office box in Iowa City, Iowa.

The victim told Officer Kenneth Murray from the Fort Collins Police Department that she had previously dated the defendant, who resided in Iowa City, Iowa. She stated that after their relationship ended, the defendant inundated her with hate mail. He also mailed a pair of the victim's eyeglasses to her, but had booby-trapped the glasses in an apparent attempt to harm the victim. At the preliminary hearing on September 6, 1989, Officer Murray testified that the post office box on the poster was listed to the defendant. He further testified that no records existed indicating that the victim had been involved in any illegal activities.

At the conclusion of the preliminary hearing, the trial court bound the case over for trial upon finding probable cause to believe that the defendant had committed the crime charged. Thereafter, the defendant filed a motion to dismiss in a pretrial proceeding, contending that the criminal libel statute was unconstitutional. The trial court granted the defendant's motion, finding that the statute was unconstitutionally overbroad because it lacked an "actual malice" requirement for false statements about public officials. Without this standard, the statute could inhibit criticism of public officials, which is protected expression under the first and fourteenth amendments to the United States Constitution[2]

[2]Amendment I to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." This guarantee applies to the states through the fourteenth amendment of the Constitution. *Douglas v. City of Jeannette,* 319 U.S. 157, 162 (1943).

and article II, section 10, of the Colorado Constitution.[3] The trial court further stated that although the statute could be applied constitutionally to the defendant's conduct, the defendant nevertheless had standing to challenge section 18-13-105's facial overbreadth because it threatened to chill first amendment expression by third parties.[4] Thus, the trial court invalidated the entire statute on its face as unconstitutionally overbroad.

II.

On appeal, the defendant contends that the trial court was correct in ruling that section 18-13-105's lack of an "actual malice" standard renders the statute overbroad, thereby requiring invalidation of the entire statute in all of its applications.[5] We disagree.

A.

We first consider the category of expression that is protected, as well as that which is unprotected, by the first amendment in

[3]Article II, § 10, of the Colorado Constitution states:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

[4]In first amendment cases, a defendant may challenge a statute on its face when it threatens to deter third parties from engaging in protected expression, even though the statute could be applied constitutionally to the defendant. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *City of Englewood v. Hammes*, 671 P.2d 947, 950 (Colo. 1983). We decline, however, to address the issue of the defendant's standing because our partial invalidation of § 18-13-105 renders that issue moot. *See infra*, part II, section C, of this opinion.

[5]The defendant concedes, however, that § 18-13-105 is constitutional as it applies to his conduct.

the area of libel. Originally, libel against anyone was believed to be outside the scope of first amendment protection. The United States Supreme Court enunciated this long-held view in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), when it stated:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, *the libelous*, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality.

Id. at 571-72 (emphasis added). In 1964, the Court rejected the view that all libel was beyond first amendment protection when it began to define the constitutional limitations of state libel laws as they pertained to defamatory statements about public officials. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court established the rule that a defamatory false statement about a public official was not actionable for damages unless it was made with "actual malice"—that is, unless the defendant knew that the defamatory statement was false, or acted in reckless disregard of the truth. *Id.* at 279-80.[6] Its conviction that speech about public affairs was essential to the democratic process motivated the *New York Times* Court to formulate a rule which reflected the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and some-

[6]The *New York Times* "actual malice" standard is distinguishable from common law malice, which meant spite or ill will. L. Tribe, *American Constitutional Law* § 12-12, at 864 n.21 (2d ed. 1988).

times unpleasantly sharp attacks on government and public officials." *Id.* at 270.[7]

The Court later extended the application of the *New York Times* "actual malice" rule to cases where criminal sanctions were imposed for criticism of the official conduct of public officials. *Garrison v. State of Louisiana,* 379 U.S. 64, 67 (1964). Despite the separate interests served by civil and criminal libel statutes, at least historically,[8] the Court concluded that the same constitutional limitations applied where defamation of public officials was concerned. *Id.* at 67, 74. Today, in civil or criminal libel actions brought by public officials, truth is an absolute defense, and only false statements made with "actual malice" are subject to sanctions. *See id.* at 74.

In *Garrison,* however, the Court specifically noted that its development of the *New York Times* rule in no way impacted the area of purely private libels. *Id.* at 72 n.8. Following *New York Times* and *Garrison,* the Court indeed recognized that the first amendment justification for the "actual malice" rule was reduced

[7]The *New York Times* privilege was later applied to publications about public figures so that those who thrust themselves into the public arena had no redress for defamatory false statements without proof of actual malice. *See Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

[8]The historical rationale for the criminal punishment of libel, which is still used today, was that libels could be penalized by the state because they tended to create breaches of the peace when the libel victim or his friends sought revenge on the libeler. At common law, truth was no defense, for the truth was even more likely to cause breaches of the peace. Kelly, *Criminal Libel and Free Speech,* 6 Kan. L. Rev. 295, 301 (1958). *See also Bearman v. People,* 91 Colo. 486, 491-92, 16 P.2d 425, 427 (1932) ("[T]he law makes the publication of a libel a crime, not because of injury to the reputation of an individual, but because such publication tends to affect injuriously the peace and good order of society."). While criminal action was used to preserve the peace, civil action was the more popular remedy, as it is today, because it provided compensation for damage to the reputation of the person defamed. Kelly, *supra,* at 299.

when a defamer libeled a private person. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court refused to extend the *New York Times* "actual malice" standard to media defamation of a private individual on a matter of public concern. Specifically, the Court held that private individuals, as opposed to public officials, need not prove "actual malice" to recover actual damages, although "actual malice" must be shown to recover presumed or punitive damages. *Id.* at 348-49. Instead, the states were given the latitude to define for themselves the appropriate standard of liability for a media defendant that injures a private person's reputation with defamatory falsehoods, so long as liability is not imposed without fault. *Id.* at 345-47. The Court reasoned that private individuals were more vulnerable to injury given their limited opportunities to counteract false statements. Moreover, unlike public officials, private persons do not voluntarily expose themselves to the increased risk of injury from defamatory falsehoods and are therefore more deserving of recovery. *Id.* at 344-45. In *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749 (1985), the Court addressed whether the *Gertz* rule applied when the defamatory false statement did not involve a matter of public concern. The Court held that, in light of the "reduced constitutional value" of speech on purely private matters, presumed or punitive damages may be awarded for such statements, even absent a showing of "actual malice." *Id.* at 761. The Court has thus recognized that purely private defamation is of less first amendment concern because it "has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment." *New York Times*, 376 U.S. at 301-02 (Goldberg, J., concurring).

In accordance with the latitude that *Gertz* bestowed upon the states in the area of private defamation, this court has held that, in a purely private context, the balance should be struck in favor of the state's interest in protecting its private citizens from injury

by false statements. *See Rowe v. Metz*, 195 Colo. 424, 426, 579 P.2d 83, 85 (1978). Applying this rationale to section 18-13-105, it is inappropriate to require that defamatory false statements must be made with "actual malice" in situations, such as the present case, where one private person disseminates defamatory statements about another private individual in the victim's community. Rather, in a purely private context, a less restrictive culpability standard may be used to meet the state's legitimate interest in controlling constitutionally unprotected conduct injurious to its citizens. Thus, section 18-13-105 can be applied constitutionally to private defamers who "knowingly publish or disseminate . . . any statement or object tending . . . to impeach the honesty, integrity, virtue, or reputation" of a private individual. § 18-13-105(1).

B.

We next consider the defendant's contention that section 18-13-105 must be invalidated in its entirety because it criminalizes constitutionally protected criticism of public officials on matters of public concern, as well as constitutionally unprotected libel in the private context, such as that engaged in by the defendant.

A statute is facially overbroad if it sweeps within its reach constitutionally protected, as well as unprotected, activities. *Bolles v. People*, 189 Colo. 394, 397, 541 P.2d 80, 82 (1975). A facially overbroad statute may be struck down as invalid when it threatens to deter individuals from engaging in activities that are protected by the first amendment. In recognition of the state's interest in controlling harmful, constitutionally unprotected conduct, the complete invalidation of an overly broad statute is considered "strong medicine" to be employed cautiously and "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 985 (Colo. 1981). Hence, overbreadth scrutiny is necessarily

controlled by the rule that a law should not be voided on its face unless its "chilling effect" on constitutionally protected activity is substantial. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *New York v. Ferber*, 458 U.S. 747, 771 (1982); *Broadrick*, 413 U.S. at 615. If a statute is not substantially overbroad, then whatever overbreadth may exist should be resolved on a case-by-case basis. *Broadrick*, 413 U.S. at 615-16; *May v. People*, 636 P.2d 672, 676 (Colo. 1981).

It is rare, however, that a substantially overbroad statute will be invalidated *in toto* when partial invalidation will rid the statute of the constitutional infirmity of overbreadth. *See Brockett*, 472 U.S. at 504. The Court acknowledged this practice in *Broadrick* when it stated that the enforcement of an overly broad statute "is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick*, 413 U.S. at 613.[9] Moreover, the Court has "long respected the state Supreme Courts' ability to narrow overbroad statutes so as to limit the statute's scope to unprotected conduct." *Osborne v. Ohio*, 110 S. Ct. 1691, 1702 (1990). *See also Ferber*, 458 U.S. at 769 n.24 (when dealing with a statute challenged as overbroad, state courts are free to construe the statute to avoid constitutional problems when it is subject to a limiting construction). The key to saving an overbroad statute from its constitutional infirmities is to discover the core of constitutionally unprotected expression

[9]On facial invalidation of overbroad statutes, Professor Tribe states:

> A plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

L. Tribe, *supra* note 6, § 12-27, at 1022 (emphasis in original).

to which the statute might be limited. *See Houston v. Hill,* 482 U.S. 451, 468 (1987).[10]

We recognize that section 18-13-105's lack of an "actual malice" standard threatens to deter a substantial amount of expression protected by the first amendment. We find, however, that the determinate rules developed by the United States Supreme Court in the area of libel allow us to save the statute through partial invalidation.

C.

From the United States Supreme Court's pronouncements concerning libel we discern a precise category of protected conduct that falls outside of the legitimate sweep of section 18-13-105. That category consists of libelous statements about public officials or public figures involving matters of public concern. This category of constitutionally protected conduct gives us a clear line by which to distinguish the statute's constitutional and unconstitutional applications. We therefore hold that section 18-13-105 is invalid only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public

[10]Facial invalidation remains a viable solution to the Court, but its use has been restricted to those situations where it had no choice but to strike the law down for its inability to find a logical dividing line. *See* L. Tribe, *supra* note 6, § 12-28, at 1028-29. *Compare Brockett,* 472 U.S. at 504-05 (the Court only partially invalidated a state's obscenity statute by severing the ban on constitutionally protected materials that incite "normal" lust from the ban on material that reaches genuinely obscene material) *with Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (the Court invalidated *in toto* an overbroad law that prohibited the solicitation of contributions by charitable organizations that did not use a certain percentage of their receipts for charitable purposes; the statute's fatal flaw was that it created an unnecessary risk of chilling free speech in *all* of its applications). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 891 (1970) (where a rule pertaining to a particular subject matter, such as defamation, "defines clearly protected activity, it might be used as a rule of excision rather than as a trigger for a holding of facial invalidity").

concern. Our partial invalidation, however, affects only the application of subsection (1) of the statute. Truth shall remain an affirmative defense pursuant to section 18-13-105(2)[11] and article II, section 10, of the Colorado Constitution.[12]

The statute remains valid to the extent that it penalizes libelous attacks under the facts of this case, where one private person has disparaged the reputation of another private individual. Accordingly, the judgment of the trial court is reversed and the case is remanded with instructions to reinstate the charge against the defendant.

JUSTICE QUINN dissents.

CHIEF JUSTICE ROVIRA does not participate.

People v. Ryan, No. 89SA497

JUSTICE QUINN dissenting:

Section 18-13-105, 8B C.R.S. (1986), criminalizes the publication or dissemination of a statement that tends to "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose [that person] to public hatred, contempt, or ridicule." I have no disagreement with the majority's partial invalidation of this statute to the extent that it attempts to criminalize the libel of public officials and public figures on matters of public concern. The instant prosecution does not involve the libel of a public official or a public figure, but rather is based on the alleged libel of a private person on essentially a matter of private concern. Because I am unable to accept the majority's construction of section 18-13-105 as related to the criminal libel of a private person, I dissent.

---

[11]Section 18-13-105(2) disallows the truth defense for "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." The constitutionality of these exceptions to the truth defense were not raised on appeal. We therefore decline to address that issue at this time.

[12]*See supra* note 3.

In the context of libel, the term "actual malice" means making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964). The majority rejects the defendant's claim that the lack of the "actual malice" requirement in section 18-13-105 renders the statutory proscription of criminal libel overbroad and concludes, instead, that "section 18-13-105 can be applied constitutionally to private defamers who 'knowingly publish or disseminate . . . any statement or object tending . . . to impeach the honesty, integrity, virtue, or reputation' of a private individual." Maj. op. at 10. The majority reaches this conclusion by drawing primarily on *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985) (opinion of Powell, J., announcing judgment of court), and *Rowe v. Metz,* 195 Colo. 424, 579 P.2d 83 (1978), both of which involved civil claims for defamation brought by a private person on a matter of private concern. I acknowledge that in matters of purely private concern, the free speech protections of the United States and Colorado constitutions are less stringent than in the case of speech involving a matter of public concern. *Dun & Bradstreet,* 472 U.S. at 759-60. We deal in this case, however, with the statutory definition of a crime and not with the conditions for recovery of civil damages for an alleged defamatory statement.

In considering whether a criminal statute is constitutionally overbroad, a court's task is to determine "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. The Flip Side, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982). Because ambiguous statutory terminology causes citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," *Bagget v. Bullitt,* 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958), the vagueness of a statutory enactment affects overbreadth analysis. *Hoffman Estates,* 455 U.S. at 494, n. 6. The mere fact that a private

person may recover civil damages for libel without proof of actual malice affords no basis, in my view, on which to construct a rationale for criminal libel. In *Garrison v. Louisiana,* 379 U.S. 64 (1964), for example, the United States Supreme Court reversed the conviction of Garrison, the District Attorney of Orleans Parish, Louisiana, for criminal libel based on his disparaging remarks at a press conference that eight judges on the criminal court of the Parish were inefficient, lazy, had taken excessive vacations, and had hampered his efforts to enforce the vice laws. Garrison was prosecuted under a Louisiana criminal statute that defined criminal defamation as the malicious publication of anything that tends to "expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse," or "[t]o injure any person" in his "business or occupation." 379 U.S. at 65 n.1. The Supreme Court held that the Louisiana statute failed to pass constitutional muster because it "directs punishment for true statements made with 'actual malice,' " as well as false statements without regard to whether the person making the statements knew the statements were false or acted in reckless disregard of whether they were true or false. 379 U.S. at 78. In the course of its opinion, the court remarked that "[c]hanging mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that 'under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.' " 379 U.S. at 69 (quoting *Emerson, Toward a General Theory of the First Amendment,* 72 Yale L.J., 877, 924 (1963)).

Although the persons libeled by Garrison's remarks were public officials, I do not read the Court's opinion to turn the decision on that ground. Indeed, the Court observed in the course of its opinion that criminal sanctions "cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle [that person] to maintain a civil suit." 379 U.S. at 69-70 (quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7,

Comments, at 44). A construction of statutory criminal libel that does not incorporate as essential elements of criminal libel the falsity of the statement and knowledge of its falsity, or at a minimum reckless disregard of truth or falsity, will inexorably induce silence as an alternative to avoiding entrapment in the amorphous and uncertain zone of criminality created by the statute. *See Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973) (statute punishing libelous, scurrilous, defamatory, or threatening statements, written on outside of envelope or postcard, stricken as unconstitutionally overbroad and vague); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978) (Alaska's criminal defamation statute invalidated as overbroad and unconstitutionally vague).

The majority's effort to narrow the sweep of the statutory proscription by judicial construction does not eliminate the vagueness and concomitant overbreadth inherent in the court's construction. The majority relies on the element of "knowingly" in section 18-13-105(1) as the basis for constitutionally applying the statute to a private defamation. The majority's construction of the term "knowingly," however, limits that element to the publication or dissemination of the statement and not to the falsity of the statement. Maj. op. at 10. Thus, a person arguably would be subject to criminal prosecution for the knowing publication or dissemination of a defamatory statement even though the statement was true and the person making the statement knew it to be true. While it might be appropriate to subject the defamer of a private person to civil liability in the absence of actual malice, *see Dun & Bradstreet*, 472 U.S. 749; *Rowe*, 195 Colo. 424, 579 P.2d 83, it is quite another matter to subject that same defamer to a conviction for criminal libel in the absence of any proof whatever that the statement was false or that the person making the statement either knew it to be false or, at a minimum, acted with reckless disregard of its truth or falsity.

The majority also attempts to salvage the statute by emphasizing that "[t]ruth shall remain an affirmative defense pursuant to

section 18-13-105(2) and art. II, sec. 10, of the Colorado Constitution." Maj. op. at 14-15 (footnotes omitted). If truth is merely an affirmative defense to criminal libel, it would seem to follow that the prosecution is under no obligation to establish the falsity of the publication in the first instance. A prosecution for criminal libel for a true statement, even if made in the belief that it was false, suffers from the same constitutional infirmity as a prosecution for a false statement made without knowledge of its falsity or without reckless disregard of its truth or falsity. *See Garrison*, 379 U.S. at 78. " 'Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 323, 340-41 (1974) (quoting *New York Times v. Sullivan*, 379 U.S. at 279).

In the course of relegating truth to the status of an affirmative defense, the majority declines to address subsection 18-13-105(2), which disallows the truth defense in libel "tending to expose the natural defects of the living." Maj. op. at 15, note 13. If this exception to the affirmative defense in the case of a libel tending to expose the natural defects of the living remains in effect, it follows that a person publishing a true statement that exposes the natural defects of a living person would nonetheless be subject to criminal prosecution in spite of the truth of the statement.

Rather than eliminating constitutional deficiencies that render the statutory definition of criminal libel constitutionally defective, the court's construction of the statute preserves those very deficiencies. In that respect, the court's efforts are strikingly similar to the judicial construction of criminal libel that was struck down in *Ashton v. Kentucky*, 384 U.S. 195 (1966). Ashton was indicted for publishing a false and malicious publication that tended to degrade or injure three named persons. The trial court charged the jury that "criminal libel" is defined as "any writing calculated to create disturbances of the peace, corrupt the public morals, or

lead to any act, which, when done, is indictable," 384 U.S. at 198, and then added in its charge that both "falsity" and "malice" were essential elements of the offense. *Id.* In reversing Ashton's conviction because he was tried and convicted on the basis of a judicial construction of criminal libel that did not eliminate the vagueness and uncertainty in the elements of the crime, the Supreme Court stated:

> Here . . ., we deal with First Amendment rights. Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. We said in *Cantwell v. Connecticut*, [310 U.S. 296 (1940)], that such a law must be "narrowly drawn to prevent the supposed evil," 310 U.S., at 307, and that a conviction for an utterance "based on a common law concept of the most general and undefined nature," *id.*, at 308, could not stand.

384 U.S. at 200-01 (footnotes omitted); *see Grayned v. City of Rockford*, 408 U.S. 104 (1972). If the jury charge in *Ashton*, which included falsity and malice as essential elements of criminal libel, was not sufficient to salvage Kentucky's definition of criminal libel from constitutional infirmity, I fail to see how the majority's construction of section 18-13-105, which does not incorporate either falsity or malice into the definition of criminal libel, can survive constitutional scrutiny. Indeed, it has been cogently observed that "with the advent of *Garrison* and *Ashton*, a strong argument may be made that there remains little constitutional validity to criminal libel laws." *Tollett*, 485 F.2d at 1094.

The absence of objective criteria in section 18-13-105, even with the majority's construction, creates a serious potential for selective enforcement, which is "both the hallmark and the vice of a vague criminal statute." *Gottschalk*, 575 P.2d at 295. It strikes me as a dangerous precedent when the effect of a judicial construction results in setting a net "large enough to capture all possible offenders," and leaving it to courts "to step inside and

say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). I accordingly dissent.

APPENDIX B

DISTRICT COURT,
COUNTY OF LARIMER,
STATE OF COLORADO

Case No. 89CR286

ORDER—DEFENDANT'S MOTION TO DISMISS

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

DENNIS EDWARD RYAN,
Defendant.

This matter is before the Court for ruling on Defendant's Motion to Dismiss, and the Court, having reviewed submissions of the parties and heard oral argument, makes the following Findings and Orders:

The Defendant is charged in a single-count Information with criminal libel pursuant to 18-13-105, C.R.S., as amended. The Defendant asserts that the Information should be dismissed, as this statute violates the United States and Colorado Constitutions. Defendant asserts that the statute is overbroad, void for vagueness, and in violation of U.S. Supreme Court decisions requiring "knowledge statement false or made in reckless disregard whether true or false" as an element of criminal libel.

There are several concepts that guide the Court in reviewing statutes and ruling on attacks as being made herein by the Defendant (see Footnote 1).

The first argument asserted by the Defendant is that the criminal libel statute violates the First and Fourteenth Amendments to the United States Constitution and Article II of the Colorado Constitution. Defendant relies upon the U.S. Supreme Court de-

cisions of *New York Times Co. v. Sullivan*, 376 U.S. 254, and *Garrison v. Louisiana*, 379 U.S. 64, which hold that:

> The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.

The Defendant recognizes that this standard applies to "false statements against public officials". Defendant, however, asserts that he has standing, even though he is not a public official, per the Colorado Supreme Court decision of *May v. People*, 636 P.2d 672 at page 675:

> An exception to the . . . rule is recognized in First Amendment cases where the rules of standing are broadened to permit a party to assert the facial unconstitutionality of a statute which may chill the protected expression of third persons, even though the statute could be constitutionally applied to the party before the Court.

Defendant asserts that the statute is "facially unconstitutional" as it provides that "a person who shall knowingly publish or disseminate", and does not include the required standard that the statement was "*made with knowledge of its falsity or in reckless disregard of whether it was true or false*". The Court addressed the question to the District Attorney whether it was his position that "knowingly" included or could reasonably be interpreted to include "knowledge of the false nature of the statement or the reckless disregard of whether the statement was true or false". The District Attorney has candidly stated that considering Colorado's definition of "knowingly", he could not make that representation. It is the District Attorney's position that this Court could, however, expand the definition of "knowingly" or interpret or apply it to include such a requirement. If the matter before the Court were a common law crime or civil action, then the Court would have the authority to define or expand such a definition. However, the Court has before it a "statutory crime" and should not act in place of the State Legislature to define crimes.

The People also object to Defendant's assertion of standing and urge this Court to apply the statue in the content of Defendant's actions. There is no doubt that if the Court found the statute to be constitutional, there would, indeed, be a question of fact to submit to the trier of fact. Also, it is clear that Defendant's conduct could, at best, be considered to be reprehensible and outrageous, and should be addressed in either a civil or criminal proceeding, but Courts should not be influenced by the gravity of the conduct. Thus, while this Court *could* "constitutionally apply" the statute to the Defendant, this Court finds that the Defendant does have standing to raise this issue.

The United States Supreme Court has clearly required that for a state to punish a statement as a crime, the statute setting forth said crime must include the New York Times standard. "Knowingly" is defined in Colorado as "that a person is aware that his conduct is of such nature or that such circumstance exists". This is not sufficient to encompass the required false knowledge, etc. Thus, the Court finds beyond a reasonable doubt that 18-13-105, C.R.S., is facially unconstitutional for the reasons stated hereinabove.

While this ruling by the Court prohibits the prosecution of the Defendant, the Court is aware that this ruling must be appealed to the Colorado Supreme Court and there are other issues that should be addressed. The Defendant also attacks the statute on the basis of it being "overbroad" or "vague". The Court has some concern with the archaic language of the statute (i.e.: blacken the memory of one who is dead; expose the natural defects of one who is alive). However, it appears from a review of the statutes in other states that language similar, if not identical, is included in these statutes and has withstood the "test of time", and has been applied to conduct alleged to be "criminal libel". Therefore, this Court would find that the Defendant has not shown beyond a reasonable doubt that 18-13-105, C.R.S., is unconstitutional as being vague or overbroad.

The last issue raised is addressed to paragraph 2 of the statute incorporating truth as an affirmative defense, except for libels tending to blacken the memory of the dead or expose a natural defect of the living. Under Colorado's concept of shifting the burden on affirmative defenses to the prosecution, it would appear that the Colorado statute does meet the requirement of "truth being an absolute defense", with the exceptions noted. The Defendant does not argue that the exception of "libels tending to blacken the memory, etc." invalidates the statute, and while one may interpret the U.S. Supreme Court's discussion of truth as requiring it to be applied in these areas, there is no appellate authority existing whereby this Court should make that determination.

The Court, in reaching this decision, has not only been persuaded by the analysis of criminal libel made by the U.S. Supreme Court in *Garrison, supra*; but also the decision of the Supreme Court of Arkansas in *Westin v. State of Arkansas*, 528 S.W.2d 412, and the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Armao*, 286 A.2d 626.

BY THE COURT this 8th day of December, 1989.

WILLIAM F. DRESSEL
District Court Judge

(1) A statute is presumed to be constitutional and the party attacking the statute has the burden of proving it unconstitutional beyond a reasonable doubt, even in cases in which it is alleged that a statute infringes on First Amendment freedoms.

A law is impermissibly vague if it is not sufficiently definite to alert the populous to the nature of the proscribed conduct so that the people may control their actions accordingly, or if the law does not provide specific standards so as to avoid arbitrary and capricious enforcement. While a statute must be sufficiently specific to give fair warning to the proscribed conduct, it need not be drafted with mathematical precision.

Overbreadth claims may be entertained where statutes purport to regulate the time, place, and manner of expressive or communicative conduct . . . but facial overbreadth has rarely been found when a suitable limiting construction has been or could be placed on the challenged statute . . . Where conduct and not merely speech is involved, the overbreadth of a statute must be both real and substantial. If a statute is not substantially overbroad, "whatever overbreadth may exist shall be cured through case-by-case analysis of the factual situations to which its sanctions, assertedly, may not be applied".

APPENDIX C

SUPREME COURT, STATE OF COLORADO

CASE NO. 89SA497

APPEAL FROM THE DISTRICT COURT, LARIMER COUNTY, 89CR286

MANDATE

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

DENNIS EDWARD RYAN,
Defendant-Appellee.

This cause having been brought to this court as an appeal from the District Court of Larimer County, and having been heretofore submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of the District Court of Larimer County shall be, and the same hereby is, REVERSED.

NOW THEREFORE, this cause is remanded to the District Court of Larimer County with instructions to reinstate the charge against the defendant.

WITNESS, the HONORABLE LUIS D. ROVIRA, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 27th day of March, 1991.

MAC V. DANFORD
Clerk of the Supreme Court.

_____

Deputy Clerk

APPENDIX D
DISTRICT COURT,
LARIMER COUNTY,
STATE OF COLORADO
Case No. 89-CR-286
Courtroom No.

INFORMATION **CRIMINAL LIBEL**
Class 5 Felony

THE PEOPLE OF THE STATE OF COLORADO,
v.
DENNIS EDWARD RYAN,
Defendant

STUART A. VANMEVEREN, District Attorney within and for the Eighth Judicial District of the State of Colorado, in the County of Larimer and State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the Court that:

Between March 1, 1987 and April 10, 1989, in the County of Larimer and State of Colorado,

DENNIS EDWARD RYAN,

did unlawfully, feloniously and knowingly publish and disseminate, by written instrument, sign, pictures, and the like, a statement and object tending to impeach the honesty, integrity, virtue, and reputation and expose the natural defects of one who is alive, namely, CINDY LEE DUNCAN, and thereby expose her to public hatred, contempt and ridicule;

contrary to Colorado Revised Statutes, 18-13-105, as amended, and against the peace and dignity of the same People of the State of Colorado.

STUART A. VANMEVEREN
District Attorney
Eighth Judicial District of Colorado

By _____
JEROME R. ROSELLE
(No. 11499)
Deputy District Attorney